In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-740

ANNA F. DITSON, TRUSTEE,
Appellant,

v.

CITY OF BOSTON,
Appellee.

APPELLEE'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL

Appellee moves this Court to dismiss the appeal herein sought on the following grounds:

I. The Appellant has distorted the facts.

II. The appeal was not taken in conformity to Rules 16(1) (a) and 34(2) of the Supreme Court Rules.

III. The appeal presents no substantial federal question.

IV. The judgment of the Court below rests on an adequate non-federal basis.

/s/ Mack K. Greenberg

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QUESTIONS PRESENTED

The questions presented for review are contained in Appellee's Motion to Dismiss.

Statutory Provisions Involved

Mass. Gen. Laws c.59, §11

"Taxes on real estate shall be assessed in the town where it lies, to the person who is the owner on January first, and the person appearing of record, in the records of the county, . . . where the estate lies, as owner on January first, . . . shall be held to be the true owner therof; . . . "

* * * *

Mass. Gen. Laws c.60, §54

"The instrument of taking shall be under the hand and seal of the collector, and shall contain a statement of the cause of taking, a substantially accurate description of each parcel of land taken, the name of the person to whom the same was assessed, the amount of the tax thereon, and the incidental expenses and cost to the date of taking. Such an instrument of taking shall not be valid unless recorded within sixty days of the date of taking. If so recorded it shall be prima facie evidence of all facts essential to the validity of the title so taken, whether the taking was made on or before as well as since July first, nineteen hundred and fifteen. Title to the land so taken shall thereupon vest in the town, subject to the right of redemption. Such title shall, until redemption or until the right of redemption is foreclosed as hereinafter provided, be held as security for the repayment of said taxes with all intervening costs, terms imposed for redemption and charges, with interest thereon, . . . "

Mass. Gen. Laws c.60, § 61

"Whenever a town shall have purchased or taken real estate for payment of taxes the lien of the town on such real estate for all taxes assessed subsequently to the assessment for payment of which the estate was purchased or taken shall continue, and it shall be unnecessary for the town to take or sell said real estate for non-payment of said subsequent taxes, costs and interest; and on redemption from such taking or purchase, said subsequent taxes, costs and interest shall be paid to the town, and the payment shall be made a part of the terms of redemption. . . ."

* * * * *

BRIEF AND ARGUMENT

[all references to appendices refer to those set out in Appellant's jurisdictional statement]

I. THE APPELLANT HAS DISTORTED THE FACTS.

As will hereinafter appear, Appellant's staccato recital of what she terms the relevant facts, is taken out of context and hence does an injustice to the findings of the Land Court Judge (Appendix B, pp. 19-35) and of the Appeals Court (Appendix C, pp. 36-52).

a)Appellant states at page 6 of her jurisdictional statement that an independent contractor retained by the City (Appellee) spent three weeks removing her personal property and papers, and that she was not allowed on the premises while the cleaning operations were taking place except when accompanied by a member of the department.

Standing alone those assertions, if left unchallenged, may be construed as a silent condemnation of the Appellee for excluding the Appellant from her home while its representative combed her personal possessions. The findings of the Land Court Judge describing the enormous quantities of debris in and about the premises place a different gloss on

the scene both as to why the Appellant was not permitted to enter the premises and as to the nature of the material that was removed. (Appendix B. pp. 27,30).

A series of photographs showing the exterior as well as the interior of the premises was received in evidence. They are not included or referred to in the jurisdictional statement. Since the Appellant has not requested the record to be certified to this Court, Appellee, pursuant to Rule 12 of the Supreme Court Rules has requested that the entire record, including the photographs, be certified and transmitted to this Court. When so transmitted the photographs will show an incredible collection of debris, rubbish, dog and cat litter and the like, filling the stairwells and hallways as well as the rooms. Living in a car parked in the back yard as found by the Land Court Judge (Appendix B, p.30) becomes more understandable.

b) Appellant states at page 7 of her jurisdictional statement that although she was not allowed on the property she continued to be taxed for the years 1970, 1971 and 1972.

According to the findings of the Land Court Judge at page 31 of Appendix B;

> "After the premises at 171 Marlborough Street had been cleaned up in the summer of 1969, Mrs. Ditson apparently lived in the car in the rear of the premises and occupied the premises if not for living purposes then for other reasons, among them as a place of abode for a varying number of dogs. Accumulations of debris again appeared in the rear of the premises and there was evidence from the neighbors that some of this material found its way into the building."
>
> "Sometime in May 1971, . . . she was living in and about the automobile in the rear of 171 Marlborough Street."

Thus the statement by the Appellant that she was taxed for the years 1971 and 1972 although she was not allowed on the premises does not comport with the facts. Moreover,

in Massachusetts as in substantially all other states, ownership and not occupancy is the basis for real estate tax liability. See Mass. Gen. Laws c.59 §11. According to the findings of the Land Court Judge the Appellant became the owner in 1949 and that the property was properly assessed to her for the years 1969 through 1972 (Appendix B p. 26).

c) Appelant's jurisdictional statement at page 7 states as follows:

> "On October 20, 1976, the City of Boston, after having received notice of Mrs. Ditson's appeal to the United States Supreme Court, sold her home located at 171 Marlborough Street, Boston at public auction to the highest bidder for $40,000 plus pro rata taxes of $8,000."

Clearly the above statement is not part of the record. Notwithstanding, it requires amplification. After the Supreme Judicial Court had denied the Appellant's request for further review, a Foreclosure Decree issued. (Appendix E). By its very terms it confirmed the City's tax taking dated May 7, 1970 based on unpaid 1969 real estate taxes (Appendix B, pp.24-26). The Foreclosure Decree also barred all rights of redemption, thereby enabling the Appellee to dispose of the property by public auction. In due course those in charge of the City's foreclosed real estate advertised the premises for sale at a public auction to be held on the premises at 9:30 A.M., October 20, 1976. Some 42 hours before the time set for the sale, and unknown to the Appellee including those in charge of foreclosed real estate, the Appellant caused to be recorded in the Registry of Deeds for Suffolk County a lis pendens based on this appeal. Other than recording the document, no effort was made to serve the auctioneer or anyone else in the City with a copy thereof. It was not until several days following the sale that Appellee received in the mail a bare copy of the document. Therefore, Appellant's recital to the effect that the Appellee sold the property at public auction after having received

notice of the lis pendens is a distortion of the facts. Since the lis pendens was recorded without prior notice to the Appellee, it violates the Fourteenth Amendment to the Constitution by depriving the owner of a significant property interest without being given the opportunity to be heard. *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). *Schneider* v. *Margossian* 349 F. Supp. 742 (D.Mass. 1972), declaring unconstitutional the Massachusetts Trustee Process Statute. *Bay State Harness Horse Racing and Breeding Association* v. *PPG Industries, Inc.*, 365 F. Supp. 1299 (D.Mass. 1973), declaring unconstitutional the Massachusetts Statutes permitting real estate attachments.

[The purchaser at the foreclosure sale has now moved to intervene and have the Land Court Judge order the lis pendens discharged].

Since the Appellant has seen fit to go outside the record, the Appellee considers it appropriate to bring to the attention of this Court that while this case was decided on the assumption that no warrant had been obtained prior to the entry, in fact, a search warrant was obtained and used when the premises were entered. When the existence of the Warrant was first discovered the case was pending in the Appeals Court. Appellant, claiming excusable neglect, moved to expand the record in the interest of justice, by including the search warrant and its accompanying documents, The motion was vigorously opposed by the Appellant. The Land Court Judge to whom the matter was referred, denied the motion. As a consequence, competent evidence of the search warrant that would have mooted this appeal as well as the appeals below was kept from the record.

II. THE APPEAL WAS NOT TAKEN IN CONFORMITY TO RULES 16 (1) (a) and 34(2) OF THE SUPREME COURT RULES.

Appellant admits at page 2 of her jurisdictional statement to the following dates:

June 3, 1974 – Land Court entered a decree foreclosing Appellant's right of redemption of her property.

May 28, 1976 – Appeals Court affirmed decree of Land Court.

June 29, 1976 – Supreme Judicial Court denied Petition for Further Appellate Review.

Sept. 27, 1976 – [the ninetieth day] Notice of Appeal to U.S. filed in Land Court.

Appellant's jurisdictional statement does not disclose the date of her request to extend the time for docketing her appeal. However, the certificate of service attached to the copy of Appellant's request, shows that the request was dated October 1, 1976.

While Rule 13 of the Supreme Court Rules permits an application for extension of time within which to docket an appeal, Rule 34(2) of the Supreme Court Rules requires that the application seeking such extension be presented to the clerk *within* the period sought to be extended. (underscoring supplied). Obviously, more than 90 days had elapsed and the appeal therefore was not filed within the time allowed by law.

Certainly, on reflection, the need for counsel, who in this case is the appointed Guardian Ad Litem, to find his client for the purpose of effecting the appeal when she could have no possible input into the legal documentation necessary for that appeal, is not the good cause necessary to warrant departure from the rule.

III. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

1. Appellant has not been denied due process.

Appellant's contention that she was denied due process is without merit. As bearing on this issue, Appellant, at page 6 of her jurisdictional statement, questions the validity of the abatement notice that was served on her pursuant to the provisions of Mass. Gen. Laws c.148, § 5, which statute is quoted verbatum at pages 4 and 5 of her jurisdictional statement.

Her arguments appearing on pages 11 and 12 of her jurisdictional statement were presented first to the Appeals Court and later, to the Supreme Judicial Court in support of her request for Further Appellate Review. In disposing of the due process issue the Appeals Court stated:

"We are not persuaded that the the notice served on the respondent was constitutionally insufficient in any of the three respects argued in her brief. One such argument is that she was incompetent and that notice requirements in the case of an incompetent person are more stringent than in other cases. While that argument is correct or supportable as an abstract proposition of constitutional law (*Covey* v. *Somers,* 351 U.S. 141, 145-147 [1956]; *Robinson* v. *Hanrahan,* 409 U.S. 38, 40 [1972], it has no application here. Although the respondent was obviously eccentric, there was no showing that she was incompetent at the time she received the notice. Compare *Nelson* v. *New York City,* 352 U.S. 103, 108-109 (1956). Nor can we agree that the notice was constitutionally defective in giving her so short a period of time to abate the condition. She had ample warning before the order was served that the condition could not be permitted to continue and in any event a person "owning a building in such shape had reasonable ground to expect that public authorities soon might require its prompt rehabilitation . . ." *DiMaggio* v. *Mystic Bld. Wrecking Co. Inc.* 340 Mass. 686, 693 (1960). The respondent's argument that she was not given adequate

warning of the high cost of the rubbish removal or of the likelihood of the loss of her home by reason thereof fails because there is no showing on this record that the amount of the charge, uncontested at the time it was assessed, was not commensurate with the quantity of rubbish on the premises and the work involved in removing it. Nor is there a showing that the authorities anticipated or had reason to anticipate at the time that the respondent would ultimately lose her home. For all that appears, the possibility of such an outcome became a probability only when the respondent failed to pay the charge many months later." (Appendix pp. 39-40)

2. The illegal entry does not preclude the assessment of the rubbish removal charge as a part of the tax lien.

Appellant's contention that the rubbish removal charge should be voided as a part of the tax lien through some convoluted application of the exclusionary rule is not supported by the prevailing law or the facts of this case. Use of the exclusionary rule has traditionally been confined to situations where the government seeks to use illegally seized evidence to incriminate the victim of the unlawful search. *United States* v. *Calandra,* 414 U.S. 338, 348, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974). For the exclusionary rule to be applied in this civil proceeding would require an unprecedented extension of the rule which, as the Appeals Court below pointed out, is neither necessary, appropriate nor desirable.

As was stated in *Calandra,* the exclusionary "rule's prime purpose is to deter future unlawful police conduct . . . [T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 347-348.

The Appeals Court below after applying the *Calandra* balancing test concluded that there existed no pattern of illegal entry by fire department officials and that no such pattern

could be presumed in the future. The Court found that substantial harm would result to the City if the rubbish removal charge was voided from the tax title account. (Appendix C, p. 50).

State Forester v. *Umpqua River Navigation Company*, 258 Ore. 10 (1971), cert. denied, 404 U.S. 826 (1971), presents an analogous situation in that it involved a civil proceeding. There an action was brought to collect for costs incurred in fighting a forest fire resulting from sparks thrown off by defendant's earthmoving equipment.

The Oregon Supreme Court held that despite an illegal search and seizure by non-law enforcement officials, the exclusionary rule was inapplicable and did not render evidence obtained from the illegal search inadmissable. Although decided prior to *Calandra*, the court in *State Forester* correctly foresaw and applied the analysis the Court subsequently adopted in *Calandra*. See too *Honeycutt* v. *Aetna Ins. Co.*, 510 F. 2d 340 (7th Cir.), cert. denied, 421 U.S. 1011 (1975), where the Court after applying the *Calandra* test, held that in civil cases the Fourth and Fourteenth Amendments do not require that the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through illegal searches made by state officials.

In light of all the foregoing, it appears that the exclusionary rule should not be extended to a civil proceeding of this nature. However, even if the Court found itself inclined to extend the exclusionary rule to civil proceedings, the instant case is an inappropriate vehicle for such an extension. The Appellant could have brought an action against the fire department officers for compensatory damages resulting from the unlawful entry. Although Appellant claims at pages 15 and 16 of her Jurisdictional statement that such a remedy was not available to her, the Appeals Court below draws attention to 42 U.S.C. § 1983 which does provide for an action against state

officials for invasion of privacy by an unlawful search and seizure. (Appendix C, p. 44).

As stated in *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282, 76 L. Ed. 1102, 52. S. Ct. 32 (1932):

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected *when such judicial action is properly invoked.*" (emphasis supplied.)

IV. THE JUDGMENT OF THE COURT BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

Appellant admits at page 7 of the jurisdictional statement that her property had been taken by the City of Boston for non-payment of the 1969 real estate taxes assessed thereon, together with the sewer and water charges and interest, by an instrument of taking recorded on May 7, 1970. This instrument of taking is the basis for the Foreclosure Decree (Appendix E, p.54). When the property of the Appellant was so taken (and there is no contest as to that aspect) title thereto vested in the City. See Mass. Gen. Laws c. 60, § 54; *Johnson* v. *McMahon*, 344 Mass. 348 (1962); *West* v. *Board of Selectmen of Yarmouth*, 345 Mass. 547 (1963). Appellee's title was subject to the right of redemption until such right was foreclosed by decree of the Land Court.

The tax taking by the City having been made, the method of foreclosing all rights of redemption lies within the Legislative discretion. *Napier* v. *Springfield*, 304 Mass. 175, (1939). The Land Court Decree (Appendix E. p. 54) has resulted in foreclosing all rights of redemption of the Appellant as well as other parties in interest. That decree does not address itself to the amount of the unpaid taxes due at the time of the taking or added subsequently by way of certification to the tax title account as permitted by Mass. Gen. Laws c.60, § 61, and c.148, § 5, quoted in the jurisdictional statement at pages 4 and

5. The fact that in 1972 all but one dollar of the 1969 tax was paid did not destroy the City's tax lien. (See decision of Land Court Judge, Appendix B, pp. 25, 30, 32) for dates subsequent charges were added to the tax account. Assuming arguendo that the rubbish removal charges were tainted, the City's tax lien for prior and subsequent unrelated charges is not thereby defeated. The pre-existing lien, based on unpaid 1969 taxes as a separate and distinct charge, supports the judgment of the Court below.

CONCLUSION

For the foregoing reasons, the appeal should be denied.

Respectfully submitted,

City of Boston
By its Attorney

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December, 1976